IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-2714

Summary Calendar*

MARVIN A. WURZER, ET AL.,
Plaintiffs-Appellants,

versus

UNIVERSITY OF HOUSTON,
LAMAR UNIVERSITY, ET AL.,
Defendants-Appellees.

(December 7, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM: Plaintiffs requested a three-judge court to hear their suit challenging the constitutionality of Texas statutes which prescribe different college tuition fee schedules for residents and nonresidents and establish a one-year presumption of non-residency for recent transferees into the state. The District Court denied the request for a three-judge court on the ground that the complaint presented no substantial federal question.

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th cir. 1970. 431 F. 2d 409, Part i.

The District Court predicated its decision on *Stanrs v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970) (Three-Judge), *aff'd,* 401 U.S. 985 (1971), and *Weaver v. Kilton,* ___ F. Supp. ___ (E.D. Tex. 1973) [C.A. No. 7784, April 24, 1973]. In *Starns,* the United States Supreme Court summarily affirmed a Three-Judge District Court's decision upholding the validity of Minnesota's tuition differential between resident and nonresident students and the State's presumption of nonresidency for those who had lived in Minnesota for less than one year. In *Weaver,* a Three-Judge Court in the Eastern District of Texas upheld the constitutionality of the Texas Statute here under attack.

The issue on this appeal is whether a substantial question remains concerning the constitutionality of the Texas statutes in light of these prior decisions.

The role of prior decisions vis-a-vis convening a Three-Judge District Court was recently discussed by the Supreme Court in *Goosby v. Osser,* ___ U.S. ___ (1973).

> In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions which merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281—A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

In light of the discussion, we do not think *Starns* and *Weaver* rendered the constitutional claims against these Texas statutes insubstantial.

Starns was decided on somewhat different facts from those alleged in the case at bar. In *Starns*, the plaintiffs were married women who moved to Minnesota and attempted within the one year period to enroll as resident students. In the case *sub judice*, the complaint alleges that a number of the plaintiffs have lived in Texas more than one year; a number of the plaintiffs are unmarried females; some plaintiffs are under 21 years of age; some are receiving support from, or are living with parents; some were born in Texas, left, and returned later; some worked full-time before entering the respective school attended; and some have paid State taxes for varying periods.

In addition, the holding in *Starns* has been questioned by Justices Marshall and Brennan in their concurrence in *Ulandis v. Kline*, ___ U.S. ___ [No. 72-493, June 11, 1973].

> I recognize that in *Starns v. Malkerson*, 401 U.S. 985 (1971), we summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits. But I now have serious question as to the validity of that summary decision in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide state residents. *See Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Id. at ____.

Weaver, as a case from the Eastern District of Texas, has only advisory value in the Southern District of Texas. The strength of the case as a precedent here is further lessened because it apparently could have been disposed of without reaching the constitutional issue.

> Thus, having failed to allege the jurisdictional statutes necessary to invoke limited, federal jurisdiction, the instant complaint is fatally defective and must be dismissed.
>
> . . .
>
> Even though Plaintiff has not shown any jurisdictional prerequisites, some comment on the merits seems advisable in view of the sentiments and interest in the issues. Therefore, for purposes of discussion, the Plaintiff's Complaint will be treated as if jurisdiction has been properly pled and proved.

____ F. Supp. at ____.

The prior decisions do not "inescapably render the claims frivolous" and a three-judge court should have been requested. We, of course, initmate no opinion as to the ultimate dispostion of the merits of the controversy.

REVERSED AND REMANDED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N.O., La.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS
OFFICE OF THE CLERK

V. Bailey Thomas
CLERK

Post Office Box 61010
Houston, Texas 77061

re: CA 73-H-302-— Marvin A. Wurzer, et al. v. University of Houston, et al

TO ALL COUNSEL OF RECORD:

Gentlemen:

Judge Carl O. Bue has made the attached Calendar Ruling dated 5/4/73.

Very truly yours,

V. BAILEY THOMAS, CLERK

By: _____ (Miss)
Rona O'Quinn, Deputy

rlo

Attachment

Marvin A. Wurzer, et al v. University of Houston, Et al
Civil Action 73-H-302

5/4/73: Defendants' unopposed motion to dismiss pursuant to Rule 12(b), Red. R. Civ. P., is granted. Counsel shall prepare and submit an appropriate order within ten (10) days. Clerk will notify counsel.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOURTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Marvin Wurzer, et al	x	
	x	
Plaintiffs,	x	
	x	
v.	x	
	x	
University of Houston,	x	
Lamar University,	x	Civil Action No. 73-H-302
Coordinating Board, Texas	x	
College and University	x	
System, Norris Kelton,	x	
Dean, Lamar University	x	
Ramon Vitulli, Dean,	x	
University of Houston,	x	
	x	
Defendants	x	

ORDER

CAME ON this day for consideration by the Court Defendants' Motion to Dismiss; and the Court having considered all authorities and arguments presented in support of said Motion and having concluded in light of *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), aff'd. without opinion, 401 U.S. 985 (1971) and the Memorandum Opinion entered in *Weaver v. Kelton, et al.* Civil Action No. 7784 (E.D. Tex. 1973) that the Complaint herein does not present a substantial federal question and that Defendants' Motion is therefore meritorious; it is accordingly

ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss is herein in all things GRANTED and that the Complaint herein be and the same is hereby DISMISSED with prejudice and costs assessed to Plaintiffs.

ENTERED this ____ day of May, 1973.

_____

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

Janis L. Weaver, Individually and For The Class She Represnts, Plaintiff	x	
Vs.	x	Civil Action No. 7784
Norris Kelton, Dean of Admissions And Records of Lamar University, et al., Defendants	x	

Honorable Phillip Bordages
Attorney at Law
2860 Park
Beaumont, Texas 77701

Honorable Peter D. Williamson
Attorney at Law
1320 Americana Building
Houston, Texas 77702

Attorneys for Plaintiff

Honorable John L. Hill
Attorney General of Texas

Honorable Sam L. Jones, Jr.
Assistant Attorney General
Capitol Station
P.O. Box 12548
Austin, Texas 78711

Attorneys for Defendants

MEMORANDUM OPINION

On August 1, 1971, Plaintiff Weaver moved from the State of Kansas to Vidor, Texas, where her husband accepted employment. Shortly thereafter, the Weavers purchased a home, registred to vote, and became subject to state and local taxes following their move to Vidor. Approximately four months later, Plaintiff Weaver enrolled in Lamar University for the January 1972 term and was classified a "nonresident" student because she did not meet the requirment of Section 54.052 (e)[1] of the Texas Education Code, which provides that an individual in Plaintiff's position can be classified a resident student only if she resides in Texas for a twelve-month period preceding her entrolling in an educational institution. Because of her nonresident classification, Plaintiff was required to pay a tuition rate ten times greater than that which was required of students who were classified as residents of Texas.

Believing herself to be a bona fide resident of Texas since August 1971, Plaintiff Weaver appealed her classification through the administrative channels afforded her under the Rules and Regulations of the Coordinating Board, Texas College and University Sys-

[1]Section 54.052 (e) reads:

> An individual 21 years of age who resides out of the state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student.

tem, which are supplemental procedures adopted to implement Section 54.052 (e) and its companion, Section 54.054.[2] Plaintiff unsuccessfully prosecuted administrative appeals to Lamar University's Dean of Admissions and Records and to the Board of Regents.

Plaintiff continued to pay out-of-state tuition fees through the 1972 summer session, but she became eligible for reclassification in August 1972, having resided in Texas for a full twelve-month period. After making application, Plaintiff was reclassified as a resident student and was permitted to pay "in-state" tuition rates;[3]

[2] Section 54.054, which is captioned Nonresident Status: Presumption; Reclassification, reads:

A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. *After residing in Texas for at least 12 months, a nonresident student may be reclassified as a resident student as provided in the rules and regulations adopted by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas.* Before February, 1972, the Coordinating Board, Texas College and University System, shall promulgate such rules and regulations.

[3] Since this suit has been filed, Plaintiff Weaver has subsequently graduated from college. Some intimation arose in the hearing of this cause that Plaintiff's reclassification, bolstered by her graduation, has rendered this cause moot. This Court rejects that interpretation in view of the class action allegations unless one were completely convinced that this Plaintiff was no longer a proper representative of the class. In any event, the gambit of issues surrounding Plaintiff's classification and reclassification remain viable so long as any possible charges paid by Plaintiff are excessive and are retained by the State of Texas.

however, despite her reclassification Plaintiff maintained a conviction that her initial classification as a nonresident was improper and violative of her constitutional rights. Therefore, Plaintiff continued to pursue this suit, which she had filed shortly before her reclassification, in order to have Section 54.054 (e) of the Texas Education Code declared to be unconstitutional as a denial of Equal Protection and Due Process.[4] Application for a three-judge court was made eventually, and under the procedures outlined in *Jackson v. Choate,* 404 F. 2d 910 (5th Cir. 1968), the Chief Judge of the circuit empaneled the present court.

I.

Jurisdiction

While the parties have not argued the formality of jurisdiction in the perspective held by this panel, this Court feels compelled to find that Plaintiff has not made proper allegations to invoke federal jurisdiction. Plaintiff's sole allegation of jurisdiction is only a bald assertion that the action is brought under the Four-

[4] Plaintiff's complaint alleges only a violation of Equal Protection. While Due Process was passingly mentioned in argument, Plaintiff's brief indicates that due process reliance is made on the strength of *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). *Bolling,* a decision in which racial segregation in Washington, D.C. was found to be violative of the Fifth Amendment since the Fourteenth Amendment applied only to the states, deserves only incidental consideration here and is therefore given only this minimal treatment.

teenth Amendment to the Constitution of the United States and that the amount in controversy exceeds $10,000.00 exclusive of interests and costs.

The Fourteenth Amendment secures a panorama of rights to the citizens and lawfully admitted aliens of the United States; however, Plaintiff confuses the mandate recognizing the *right* with the power to *remedy* violations thereof. *Morris v. Travisono,* 310 F. Supp. 857 (D. Minn. 1970). The Fourteenth Amendment does not confer jurisdiction on federal courts. *Kochhar v. Auburn University,* 304 F. Supp. 565 (M.D. Ala. 1966). Since that amendment only secures rights to citizens and the power of Congress to provide remedies through enabling legislation, it is necessary that every plaintiff set out in a complaint the applicable enabling acts, particularly the appropriate jurisdictional statutes. Thus, having failed to allege the jurisdictional ststutes necessary to invoke limited, federal jurisdiction, the instant complaint is fatally defective and must be dismissed.

II.

Applicable Law

Even though Plaintiff has not shown any jurisdictional prerequisites, some comment on the merits

seems advisable in view of the popular sentiments and interest in the issues. *Therefore, for purposes of discussion the Plaintiff's Complaint will be treated as if jurisdiction had been properly pled and proved.*

Althogh Plaintiff can present argument with some appeal, *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd without opinion,* 401 U.S. 985 (1971) seems largely dispositive of the instant case. In *Starns* two women moved to Minnesota from Illinois when their husbands obtained employment there; they attempted to register as residents in a state university before they had resided in Minnesota for twelve months; however, they were classified as nonresidents because university regulations established an irrebutable presumption that any person who had not continuously resided in Minnesota for one year immediately before enrolling in a university would be a nonresident for tuition purposes. The *Starns* three-judge panel upheld the Minnesota regulation even with a challenge based on *Shapiro v. Thompson,* 394 U.S. 618 (1969), the decision which invalidated certain year-long residency statutes for state welfare recipients. The *Shapiro* decision was argued to show that no compelling state interest justified the discrimination resulting in Minnesota's classification of some bona fide residents as non residents since the state regulation infringed on a constitutionally-protected personal fundamental right, the right to interstate movement. However, *Shapiro*

was found to be distinguishable from *Starns* because *Shapiro* dealt with states' admitted attempt to "fence-out" indigents by denying them life's basic necessities and because the facts showing the proportion of out-of-state students to in-state students simply did not support the plaintiffs' contention.[5] With no supporting proof, the *Starns* decision expressly disposed of any possible assertion of a right to interstate movement as the basic fundamental right involved in the dispute over whom a state may legitimately classify as a non-

[5] One might note that it is difficult to imagine the quantum and kind of proof which would support this contention. The *Shapiro* plaintiffs were fortunate in having express statements which reflected that the one-year waiting period for welfare assistance had the specific objective of excluding the indigents who would move to get advantage of the better benefits offered by some states. *Shapiro*, 394 U.S. at 628-29. The *Starns* plaintiffs were likewise fortunate in having statistics on the number of college students coming from out-of-state as compared with the number of students in-state, which indicated that the one-year period did not "deter any appreciable number of persons from moving into the state." *Starns*, 326 F. Supp. at 237-38. However, the meager statistics introduced at the hearing of this cause are not conclusive in themselves and they have not been persuasively argued. Isolated figures from one university which are unassociated from an analysis of the motivations of students cannot prove that student residency statutes hinder entrance into a state, although a high percentage of out-of-state students could show that the durational residency statutes do not deter students from moving into a state. Too many variables other than the higher tuition fees for out-of-state students could account for some states having larger percentages of out-of-state students than others. Choice of higher education is commonly known to be a matter largely of personal preference, family tradition, institutional reputation and quality of education as well as other intangibles occasionally preferred in some states, such as moderate climate and abundant recreational facilities.

resident student; and, this Court has found no argument, authority or proof offered by the instant plaintiff which dispells the reasoning of *Starns* on this point. Plaintiff Weaver has attempted to go one step beyond *Starns,* however, by asserting that another fundamental right is at stake over and above the right of interstate movement, the sole fundamental right asserted in *Starns.* Plaintiff asks this Court to recognize that the Texas statute infringes on the right of citizens to an education, or more precisely, the right to equal access to an education. Suffice it to say that the recent case, *San Antonio Independent School District v. Rodriquez,* decided March 21, 1973 ___ U.S. ___ (41 U.S.L.W. 4407) has put such a notion to rest for the present, at least insofar as such right being constitutionally founded.

Without the presence of a fundamental personal liberty graced with constitutional protection—the freedom of interstate movement being inapplicable and the right of equal access to education being unfounded in the constitutional sense—the strict judicial scrutiny test used to determine if state statutes violate Equal Protection cannot be applied. Since the strict test is inapplicable, the state statutes must be afforded the usual presumption of validity and the Defendants do not have to "carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the

'least drastic means' for effectuating its objectives." *Id.* at 4411-12.[6]

Even though the strict judicial test could not be used herein, the statute would still be required to muster pass the test of whether it has a rational relationship to a legitimate state interest. Once again, the *Starns* decision has given guidance. In that case, it was noted that the year-long residency statute was rationally related to an objective of the state because it was reasonable to require a person coming from out-of-state to live for a year as a bona fide domiciliary within the state in order to rebut the presumption that one who has not lived in the state previously is a nonresident. Moreover, *Starns* also further explained that since the law afforded the states the right to discriminate in tuition

[6] *Rodgriquez* extensively reviewed previous court rulings in explaining that two tests have developed when sondiering if state statutes possibly violate Equal Protection. The strict test is applied when the state statute interferes with fundamental rights or involves suspect classifications; thus, if the statute is found intruding in the area of constitutionally protected rights, the states has the burden of showing that the statute serves a compleling state interest. Without a compelling state interest, the state cannot hinder the rights guaranteed to citizens. See *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972). *See also e.g., Kramer v. Union School District,* 395 U.S. 621 (1969). However, if the classification of citizens created by the state statute, which is alleged to be discriminatory, does not affect a fundamental right or a suspect classification, constitutionality of the statute is tested on the basis of whether the statutes have been written so that they have some rational relation to a legitimate state interest. *See e.g., McGowan v. Maryland,* 366 U.S. 420 (1961).

charges between residents and nonresidents[7] that right to discriminate may be retained so that newcomers to the state shall make a contribution towards the welfare of the state's higher educational facilities. *Stanrs, supra* at 240-41.

In final analysis, we find that the issues relating to the Texas statute not dissimilar to those which confronted the Minnesota district court, and we believe that the rationale approved therein should be now controlling. Perhaps it should be stated that the citations of Plaintiff, which show that there have been successful challenges to student residency statutes in Connecticut, New Mexico and Colorado,[8] have not gone completely unnoticed. In those cases, the offending statutory enactments were found to create abhorrent conditions in that once a student was classified as a nonresident it was either impossible for him to get reclassified or it was necessary for him to all but forego a whole year's education by enrolling for a low minimum number of semester hours. Understandably, these statutes were determined to suffer constitutional infirmities; however, the Texas statutes are easily disting-

[7] *See Johns* v. *Redeker,* 406 F. 2d 878, 883 (8th Cir. 1969) for an explanation that reasonable tuition charges to nonresident students tend to make the tuition charged more nearly approximate the cost per pupil of the operations of schools.

[8] *Kline v. Vlanids,* 346 F. Supp. 526 (D. Conn. 1972), *cert. granted,* ___ U.S. ___; *Robertson V. University of New Mexico,* 350 F. Supp. 100 (D.N.M. 1972); *Covell v. Douglas,* 510 P. 2d 1047 (Colo. 1972).

uishable in that they make allowance for future reclassification of nonresidents after they have overcome the presumptions set out in the statutes. No better proof of this fact can be mentioned than that the Plaintiff in this case was herself reclassified under the procedural steps afforded her.

In conclusion, one word of caution should be noted. Plaintiff Weaver attacked only Section 54.052 (e) of the Texas Education Code, the only section which she had standing to attack. In addition, the supplemental Rules and Regulations of the Coordinating Board, Texas College and University system, have other factors to be considered in the reclassification process. This Court, nevertheless, declines to comment on any other portion of the Texas classification scheme for the reason that the discussion of this opinion is deliberately confined to Plaintiff Weaver and those who fall within the matrix of facts she presents.

Plaintiff's Complaint is Dismissed, and judgment will be entered accordingly.

DATED this 24th day of April, 1973

_____

UNITED STATES CIRCUIT JUDGE

_____

UNITED STATES DISTRICT JUDGE

_____

UNITED STATES DISTRICT JUDGE